IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 25, 2009 Session

VICTORIA MASTERS and MICHAEL MASTERS, Husband, v. WAL-MART STORES EAST, L.P.

Direct Appeal from the Circuit Court for Macon County
No. 5594-C Hon. John D. Wootten, Jr., Judge

No. M2008-02752-COA-R3-CV - Filed September 1, 2009

Plaintiff, a customer, slipped and fell on a wet floor in defendants' store. The Trial Court granted defendants summary judgment. On appeal, we vacate the summary judgment and remand.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and JOHN W. MCCLARTY, J., joined.

Luvell L. Glanton and Tusca R.S. Alexis, Nashville, Tennessee, for Appellants, Victoria Masters and Michael Masters.

Cyrus L. Booker and James O. Williamson, Nashville, Tennessee, for Appellees, Wal-Mart Stores East, L.P.

OPINION

In this action the plaintiffs averred that Ms. Masters was injured when she slipped and fell on a wet floor while shopping at a Wal-Mart store located in Lafayette, Tennessee. The Complaint further alleged that there were no wet floor signs in the vicinity where she fell and she could not discern that the floor was wet because of the color of the floor. She claimed that she sustained serious and permanent injury to her left knee that required extensive medical treatment.

Further, that Wal-Mart "knew, or should have known, about the dangerous condition of the recently mopped floor, yet they made no attempt to correct or warn Plaintiff . . . of the existing dangerous conditions."

Wal-Mart moved for summary judgment, which was supported by the affidavit of James Law, a manager of the Wal-Mart store at issue. Wal-Mart's statement of undisputed facts set forth the following:

1. The incident at issue occurred on October 2, 2007 at approximately 6:30 a.m. when Ms. Masters went to the Wal-Mart to purchase diapers for her grandson.

2. Prior to falling, Ms. Masters noticed five to ten people walking in the aisle where she eventually fell. However, she did not notice the Wal-Mart employee who was cleaning the floor in the aisle, the cleaning machine he was using or a "Wet Floor" caution sign on the floor.

3. Ms. Masters does not dispute that a "Wet Floor" sign was present before she fell.

4. At the time of the incident, a store associate was buffing the floor of the aisle. In accordance with the store's policy, a "Wet Floor" sign had been placed at the beginning of the aisle. Any person entering the aisle would have to walk past the "Wet Floor" sign.

Mr. Law's affidavit states that "[t]he Wet Floor sign was plainly visible, having been placed next to the freezer.

Plaintiffs, in their response to the Motion for Summary Judgment, contended there were facts in dispute regarding whether the "Wet Floor" sign was in place at the time of the fall and regarding whether the sign was placed in the optimum position for visualization by store patrons who entered the aisle in question. In support of their response, plaintiffs attached excerpts from deposition transcripts that contain testimony regarding the accident and the placement of the "Wet Floor" sign.

The Trial Court granted summary judgment in favor of Wal-Mart, and found that it was an undisputed fact "that a neon orange "Wet Floor" sign, which the Court observed to be 4-sided, approximately 15 inches tall and 15 inches wide at its base, and to have "CAUTION - WET FLOOR" printed on all four sides, was present in the aisle in which Plaintiff slipped and fell." The Court concluded that reasonable minds could not differ in concluding that Wal-Mart had satisfied its duty to warn the plaintiff of the condition present, and that plaintiff's own inattention under comparative fault principles was at least 50 percent responsible for her slipping on the floor.

The evidence in the record relative to the Summary Judgment which we must consider in the most favorable light to the "opponent of the Motion" is that Ms. Masters while shopping at Wal-Mart, as she entered the aisle in which she fell she noted there were other people in the aisle. Although she could not say exactly how many people she noticed, she estimated that there were at least five and perhaps up to ten people in the aisle. At the time of the fall, Mr. Copas, a Wal Mart employee, was scrubbing the floor of the aisle where Ms. Masters fell with a scrubber machine. Copas testified that his back was to Ms. Master and he did not see her until after she fell. He stated that there was a Wet Floor sign in the aisle about three feet from where Ms. Masters fell. The sign was not in the middle of the aisle as the scrubber had pushed it off to the side as it passed down the aisle. He conceded that it was possible the floor was still wet or damp where she fell.

Ms. Masters stated the floor was wet but that she did not notice the water on the floor or Mr. Copas operating the scrubbing machine until after she fell. She further stated that she did not notice the Wet Floor sign in the aisle before she fall. She claimed that the sign, which was placed in the left side of the aisle up against a freezer, was not in her "line of vision". Mr. Copas and Ms. Masters agree that he pointed the sign out to her after she fell when she questioned why there was no sign present. It is undisputed that there was a Wet Floor sign in the vicinity of where she fell and that the Wet Floor sign present at the scene of the accident was identical to the Wet Floor sign introduced into evidence. The sign is made of neon orange nylon-like fabric, it is four sided, fifteen inches high. The sign on all four sides has an identical warning "CAUTION - WET FLOOR". What is in dispute is whether the wet floor sign, situated off to the side of the aisle, was within Ms. Master's "line of vision" and, thus an adequate warning to her of the condition of the floor.

The store manager on duty, James Law, executed an affidavit in support of the motion, and he apparently inspected the aisle after the fall occurred. He stated that the Wet Floor sign had been placed at the beginning of the aisle in which Ms. Master fell in accordance with store policy. He stated that any person entering the aisle would have to walk past the sign and that it was placed off to the side of the aisle because had it been placed in the middle of the aisle it would have presented a hazard to the people transversing the aisle. Based on his inspection, he stated Ms. Masters had apparently walked past the Wet Floor sign but had not seen the sign. He pointed the sign out to her after she fell. Law stated the Wet Floor sign was "plainly visible, having been placed next to the freezer."

Pam Leath was shopping at the Wal Mart at the time Ms. Masters fell, and in her deposition, which was submitted in support of Wal Mart's Motion, her testimony is very garbled and difficult to understand. Much of her testimony was unresponsive to the questions asked, and we cannot determine exactly where Ms. Leath was in relationship to the Wet Floor sign or to Ms. Masters. Leath testified that she was approximately fifteen feet from Ms. Masters when the fall occurred, however, she did not witness the actual fall. Before the fall she noted that a Wal Mart employee was cleaning the floor of the aisle in question and that there were a lot of people in the aisle stocking the shelves. She also recalled that Ms. Masters was walking down the aisle at a fast pace as if she were in a hurry. Ms. Leath recalled seeing a Wet Floor sign in the aisle and she recalled hearing the cleaning machine and thinking she had better watch out or she would fall. Ms.

Leath heard Ms. Masters ask Mr. Law why there were no Wet Floor signs out and Mr. Law pointed out the sign in the aisle.

The issue on appeal is :

Did the Trial Court properly grant summary judgment in favor of the defendant?

The scope of review of a grant of summary judgment is well established and was recently restated by our Supreme Court in *Giggers v. Memphis Housing Authority*, 277 S. W.3d 359 (Tenn. 2009):

> Because our inquiry involves a question of law, no presumption of correctness attaches to the judgment, and our task is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Hunter v. Brown,* 955 S. W.2d 49, 50-51 (Tenn.1997); *Cowden v. Sovran Bank/Cent. S.,* 816 S. W.2d 741, 744 (Tenn.1991). A summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall,* 847 S. W.2d 208, 214 (Tenn.1993). The party seeking the summary judgment has the ultimate burden of persuasion "that there are no disputed, material facts creating a genuine issue for trial ... and that he is entitled to judgment as a matter of law." *Id.* at 215. If that motion is properly supported, the burden to establish a genuine issue of material fact shifts to the non-moving party. In order to shift the burden, the movant must either affirmatively negate an essential element of the nonmovant's claim or demonstrate that the nonmoving party cannot establish an essential element of his case. *Id.* at 215 n. 5; *Hannan v. Alltel Publ'g Co.,* 270 S. W.3d 1, 8-9 (Tenn. 2008). "[C]onclusory assertion[s]" are not sufficient to shift the burden to the non-moving party. *Byrd,* 847 S.W.2d at 215; *see also Blanchard v. Kellum,* 975 S. W.2d 522, 525 (Tenn.1998). Our state does not apply the federal standard for summary judgment. The standard established in *McCarley v. West Quality Food Service.,* 960 S. W.2d 585, 588 (Tenn.1998), sets out, in the words of one authority, "a reasonable, predictable summary judgment jurisprudence for our state." Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee,* 69 Tenn. L. Rev. 175, 220 (2001). Courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Robinson v. Omer,* 952 S. W.2d 423, 426 (Tenn.1997). A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. *Staples v. CBL & Assocs., Inc.,* 15 S. W.3d 83, 89 (Tenn.2000). In making that assessment, this Court must discard all countervailing evidence. *Byrd,* 847 S. W.2d at 210-11. Recently, this Court confirmed these principles in *Hannan.*

Giggers, 363-364.

To establish negligence, one must prove: (1) a duty of care owed by defendant to plaintiff; (2) conduct falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause. *Cohn v. City of Savannah,* 966 S. W.2d 34, 39 (Tenn.1998); *McCall v. Wilder,* 913 S. W.2d 150, 153 (Tenn.1995). The formulation of a duty of care is a question of law for the court. *McClung v. Delta Square Ltd. Pshp.,* 937 S. W.2d 891, 894 (Tenn.1996).

In a premises liability case, an owner or occupier of premises has a duty to exercise reasonable care with regard to social guests or business invitees on the premises." *Rice v. Sabir,* 979 S.W.2d 305, 308 (Tenn.1998). Business proprietors are not insurers of their patrons' safety, however, they have a duty to use due care under all the circumstances. *Martin v. Washmaster Auto Ctr. U.S.A.,* 946 S. W.2d 314, 318 (Tenn. Ct. App.1996), *Jones v. Exxon Corp.,* 940 S. W.2d 69, 71 (Tenn. App.1996)(quoting *Eaton v. McLain,* 891 S.W.2d 587, 593 (Tenn.1994). The duty includes the responsibility to remove or warn against latent or hidden dangerous conditions on the premises of which one was aware or should have been aware through the exercise of reasonable diligence. *Rice* at 308*, Eaton* at 593-94. The scope of this duty is grounded upon the foreseeability of the risk involved. *Jones* at 72. Thus, in order to prevail in a premises liability action, the plaintiff must show that the injury was a reasonably foreseeable probability and that some action within the defendant's power more probably than not would have prevented the injury. *Doe v. Linder Constr. Co.,* 845 S. W.2d 173, 178 (Tenn.1992). Although the traditional rationale for imposing this duty was the owner's superior knowledge of conditions on the premises, a duty may exist even where the injury-causing condition is "open and obvious" to the plaintiff. *Coln v. City of Savannah,* 966 S.W.2d 34, 43 (Tenn.1998), *overruled on other grounds by Cross v. City of Memphis,* 20 S. W.3d 642 (Tenn. 2000).

On the other hand, Ms. Masters, as a business invitee, had a duty to exercise reasonable care for her own safety, *McClung v. Delta Square Ltd. Partnership,* 937 S. W.2d 891, 904 (Tenn.1996), and a duty to see what was in plain sight, which in this case was the wet floor and a Wet Floor sign. *Easley v. Baker,* No. M2003-02752-COA-R3-CV, 2005 WL 697525 at *8 (Tenn. Ct. App. Mar. 24, 2005).

Wal Mart relied on the case of *Easley v. Baker* No. M2003-02752-COA-R3-CV, 2005 WL 697525 (Tenn. Ct. App. Mar. 24, 2005) to support the Trial Court's findings. In *Easley,* the owner of a bar and grill was granted summary judgment based upon facts very similar to those at issue here. Mr. Easley, a patron of the bar, entered the bar's restroom in which a large puddle of water was in plain view, and marked by a "wet floor" sign. Easley, who was headed for the row of urinals when he fell, stated that at first he did not see the puddle or sign but after taking a step into the puddle he did notice it and he chose to continue walking directly into the puddle of water. After deciding to proceed through the puddle toward the urinals he fell and sued contending the bar owner was negligent. The trial court granted summary judgment and this Court affirmed the judgment of the trial court, reasoning that Mr. Easley had a reasonable opportunity or choice to avoid the risk of the water puddle of water, noting that he "was no 'captive' in the restroom as there is no evidence that the toilet stalls were not available for his purposes or that his immediate need for urination

compelled his action." *Easley,* 2005 WL 697525 at *7.

There is, however, a significant difference between the instant case and the situation presented in *Easley*. Although Easley claimed to have not noticed the puddle and the wet floor sign when he first entered the restroom, he admitted that he did see both the puddle and the wet floor sign before he decided to continue his progress across the room, and there was no question that the wet floor sign was in the "plain sight" of Easley. Easley had an option, as the appellate court pointed out, of leaving the restroom or using the toilet stalls and he chose not to exercise those options. In this case, Ms. Masters testified that she did not see the wet floor sign until after she fell as it was not in her "field of vision" as it was pushed to the side of the aisle and up against a freezer. Her testimony, taken in the most favorable light, creates a genuine issue of material fact as to the adequacy of the warning provided by Wal Mart. Mr. Law's testimony was that the "Wet Floor" sign was plainly visible, having been placed next to the freezer". However, Mr. Law was not present when Ms. Masters entered the aisle nor was he present when she fell or when the scrubbing machine pushed the sign out of its path. Moreover, Mr. Law had no way of knowing if the sign was plainly visible to Ms. Masters just before the fall. His testimony is conclusory. The moving party, Wal-Mart, is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co.,* 31 S.W.3d 181, 183 (Tenn.2000). The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley v. W. Quality Food Serv.,* 960 S.W.2d 585, 588 (Tenn.1998). A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

We vacate the Trial Court's granting of summary judgment and remand for further proceedings consistent with this Opinion. The cost of the appeal is assessed to Wal-Mart Stores East, L.P.

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HERSCHEL PICKENS FRANKS, P.J.